RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

THELUS TODD AND OTHERS v. WILLIAM P. AUSTIN AND OTHERS.

The Act of 1864, known as the Flowage Act (Rev. of 1866, p. 89), is not unconstitutional. The decision to this effect in *Olmstead* v. *Camp*, 33 Conn. R. 532, confirmed upon full argument.

It is no objection to proceedings under the Flowage Act, that the mill is not on the same tract of land upon which the dam is sought to be erected, and that land belonging wholly to other parties lies between.

Where the petitioners had called on two landowners to state on what terms each would allow his land to be flowed, and one had declined to give any answer and the other had demanded more than the petitioners were willing to give, it was held to be a case where the parties were "unable to agree as to the damages to be paid," within the meaning of the statute.

Where the committee, upon a petition for authority to raise an existing dam to a greater height, in their report stated the authorized height merely as so much additional height to the existing dam, it was held that they had fixed the height with sufficient certainty.

The provision of the state constitution (Art. 1, § 11), that private property shall not be taken for public use without just compensation, is not to be regarded as a grant of power to the legislature, but as a restriction upon the exercise of the right of eminent domain already existing. [BUTLER and CARPENTER, JJ.]

The legislature may lawfully grant rights of easement to individuals or corporations to enable them to erect and operate structures, if the result of their operation is the production of an article or thing intended to be furnished or sold to the public for a beneficial use, and to supply their reasonable wants. [BUTLER and CARPENTER, JJ.]

PETITION under the Flowage Act, praying for authority to raise a mill-dam above its existing height, and for the assessment of damages to the several respondents, whose lands would be overflowed thereby. There were three petitioners, and the petition alleged that they were severally the owners of mills on Stony Brook, running out from Paug Pond, and that all their mills were supplied with water from the pond, the dam being situated at the outlet of the pond. The petition was brought to the Superior Court in New Haven county, and was referred to a committee, under the statute, who reported:—

That the flowing of the land would be of public use; and the height to which the dam might be built by the petitioners to be "such a height as will raise the water of Paug Pond three feet above the height to which the waters of the pond would be raised

by the dam as it stood at the date of the petition, namely, on the 23d day of February 1865."

The committee then assessed the damages of the respondents, and further reported:—

"That the dam is situated on a piece of land belonging to the petitioners, separated from each of the pieces of land on which the water-mills and manufacturing establishments of the petitioners are situated, by several intervening pieces of land belonging to several and different owners, and not belonging to the petitioners or any of them."

The respondents excepted to the report, because the dam is not situated on the same land upon which any of the water-mills mentioned in the petition are located; because testimony that the flowing of the lands in the manner proposed would be of public use was inadmissible, and the committee were not authorized to inquire whether or not it would be of public use to flow said lands by means of a dam erected upon land no part of which was connected with or attached to the land upon which any one of the water-mills mentioned in the petition was located; because the act under which the proceedings were had is unconstitutional, and because the finding and report of the committee are indefinite, vague, and uncertain, and not in conformity with the requirements of the statute, and do not show with certainty the height to which said proposed dam may be raised, nor will the record show with certainty the matter attempted to be determined.

The respondents also filed an answer, denying that the erection of said dam is or will be of or for public use; and moved that the court shall inquire for itself whether the erection of said proposed dam is or will be of or for public use.

The Superior Court (PARDEE, J.) overruled the exception, accepted the report, and decreed accordingly.

With regard to the raising of the dam being of public use, the court found "that the raising of said dam in the manner and to the extent recommended in the report of said committee, will furnish such increased quantity of water for the use of the several mills on Stony Brook, which are described in detail in said petition, as will enable the owners thereof to operate them during portions of the year in which they cannot now be operated by reason of an insufficient supply of water, and will thus increase the power, value, and usefulness of said several mill privileges,

and therefore is of public use; which fact is found upon evidence the whole of which was objected to by the respondents."

With regard to the parties being unable to agree as to the damages to be paid, the court found that the petitioners, prior to the bringing of the petition, asked the respondents, William, Joel, and Horace Austin, to state the price for which they would convey to them the right to flow so much of their land as would be covered by water in consequence of raising the water in the pond to the various heights of two, three, and four feet above the point to which it could be raised by the dam then existing at the outlet of the pond; in reply to which they stated certain terms which the petitioners were unwilling and refused to accept; and these respondents made no other proposition. Also that the petitioners applied to the respondent Elliott to state to them the price for which he would convey the right to flow his land, by raising the water in the pond three feet higher than it could be raised by the dam then existing; to which he declined to make any answer. The court thereupon found that the petitioners were unable to agree with the respondents, or either of them, as to the damage, or as to the judgment that should be rendered.

The respondents brought the record before this court by a motion in error.

H. B. Harrison (with whom were *Blackman* and *Elliott*), for the plaintiffs in error.—1. The Flowage Act is unconstitutional. It is not within the constitutional power of the General Assembly to authorize, directly or indirectly, one man to take and appropriate to his private use (either with or without compensation) the property of another: *Varick* v. *Smith*, 5 Paige 137, 159; *Matter of Albany Street*, 11 Wend. 148; *Wilkinson* v. *Leland*, 2 Peters 627; *Hay* v. *Cohoes Co.*, 3 Barb. 47; *Hartwell* v. *Armstrong*, 19 Id. 166; *West River Bridge* v. *Dix*, 6 How. 544; *Bradley* v. *N. York and N. Haven Railroad Co.*, 21 Conn. 305; *Norwich Gas Light Co.* v. *Norwich City Gas Co.*, 25 Id. 19, 38; *Woodruff* v. *Neal*, 28 Id. 169; *Taylor* v. *Porter*, 4 Hill 140; *Clack* v. *White*, 2 Swan 540; *Sadler* v. *Langham*, 34 Ala. 311; *Harding* v. *Goodlett*, 3 Yerger 41; *Commonwealth* v. *Sawin*, 2 Pick. 548, 549; *Commonwealth* v. *Cambridge*, 7 Mass. 158, 167; Constitution of Conn., Art. 1, §§ 8, 9, 11, 12, 21. The reasoning by which courts in certain states have sustained the mill acts of those

states does not apply in support of this law. The mill acts of Massachusetts, for instance, rest upon peculiarities of the common law of that state in relation to the rights of proprietors of land traversed by mill-streams—peculiarities directly in conflict with the common law of England and of Connecticut: *Murdock* v. *Stickney*, 8 Cush. 116; *Bates* v. *Weymouth Iron Co.*, Id. 548; *Jordan* v. *Woodward*, 40 Maine 322; *Williams* v. *School District*, 33 Vt. 278; *Newcomb* v. *Smith*, 1 Chandler 71; *Ingraham* v. *Hutchinson*, 2 Conn. 590; *King* v. *Tiffany*, 9 Id. 168; *Buddington* v. *Bradley*, 10 Id. 218; *Parker* v. *Griswold*, 17 Id. 288; *Thurber* v. *Martin*, 2 Gray 394; *Thompson* v. *Crocker*, 9 Pick. 59; Angell on Watercourses, § 340.

2. At any rate, the act, if constitutional, "steps to the verge of the constitutional limit," and must be construed with the utmost rigor against those who try to seize property under it, and in favor of those whose property they try to seize. No proceeding under it should be sustained unless it is brought within both the letter and the spirit of the act: *Nichols* v. *Bridgeport*, 23 Conn. 208; *Jordan* v. *Woodward*, 40 Maine 322; *Williams* v. *School District*, 23 Vt. 278. This case does not come within either the letter or the spirit of the act. The act provides only for those cases where the mill and the dam are on the "same" piece of land and under the control of the same person. It does not authorize, or intend to authorize, any petitioner to flood the land of a respondent, except in a case where the petitioner possesses the right of turning to some use the privilege seized by him under the act. If the mill is separated from the dam by land not owned or controlled by the petitioner, then the petitioner, after raising his dam to the injury of the respondent, will not be able to apply to his mill the water thus obtained. The words "on the same," in section 388, were accordingly introduced for the express purpose of preventing the act from applying to cases like this: *Farrington* v. *Blish*, 14 Maine 423; *Murdock* v. *Stickney*, 8 Cush. 117; *Bates* v. *Weymouth Iron Co.*, Id. 552.

3. It is not properly found, within the true intent of the requirement of section 388, that the petitioners could not "agree" with the respondents "as to the damages to be paid."

4. The record does not "show with certainty the matter" that has been "determined," within the true intent and meaning of the same section.

Watrous and *Rogers*, for the defendants in error.

McCURDY, J.—The principal point raised in this case—the constitutional question—was decided, after full consideration, in the case of *Olmstead* v. *Camp*, 33 Conn. R. 532. But as the question was one of great interest, and it was suggested that new views might be presented bearing especially on the particular facts of this case, a very elaborate argument was again listened to by the court.

It was claimed that in Massachusetts, where the flowage laws were said to have originated, and where they have been more frequently discussed and sustained than in any other state, principles in relation to the rights of mill-owners and riparian proprietors have been recognised as a part of their common law somewhat different from those which exist in this state and elsewhere.

However this may be, we do not understand that in that state, or in any other of the many which have enacted and upheld such laws, their defence has been placed upon any peculiarity of their common law. They are everywhere justified upon the broad ground of a paramount right of the government to take private property, upon making compensation, in cases of necessity or great public utility. It is this general authority, which, in the opinion given in the case referred to, we have endeavoured to explain and sustain by considerations which seemed to be appropriate. We see no occasion to change the views then expressed.

But it is urged that the statute provides only for a dam to be raised on the land of the mill-owner or that of another by his consent, and if it is erected on the land of the mill-owner, it must be on the identical tract on which the mill stands; and it appears in this case that the dam stands on a lot of the petitioners separate from the mill-site; the land of another person lying between the two tracts. We are unable to see any force in this objection. The object of the clause relied on is to require that the dam shall be built on a site where the owner has a right to place it. This right may result from his own ownership or from an agreement with the proprietor. The words "on the same" refer to the antecedents, "his own land" or "land of another." There is no conceivable reason for requiring the mill and the dam to be on precisely the same tract.

The respondents further object that it does not sufficiently appear that the parties were not able to agree in relation to the damages. This is a question of fact, and the Superior Court has found that they were unable to agree. If it were proper to re-examine the question, we should conclude that the evidence abundantly justified the finding. The petitioners called on the respondents to state their terms for the privilege of flowing. One party made no answer, and the other named so large a sum that the proposition was rejected.

Another objection to the report of the committee is, that they do not establish with sufficient certainty the height to which the dam may be raised. It would unquestionably have seemed more definite if they had established the height by marks upon a rock, or pillar, or some other permanent object. But we have a right to presume that the height to which the petitioners were entitled was well known and established by some such mark, and the committee, taking that for their basis, allow a certain number of additional feet.

We see no error in the proceedings, and the decree is affirmed.

In this opinion PARK, J., concurred.

BUTLER, J.—I was fully satisfied at the conclusion of the argument in *Olmstead* v. *Camp*, 33 Conn. 532, that the flowage law was sustainable upon strict and recognised principles of constitutional law; and a re-examination of the question has confirmed, rather than shaken, that opinion.

Like every other question of constitutional power exercised by the legislature under our state constitution, it presents itself to the mind in a three-fold aspect, and logically involves a three-fold inquiry.

First.—Whether the power exercised is delegated by the people to the legislature in and by the constitution specifically, or by a general grant of power sufficiently comprehensive to embrace it.

Second.—Whether the exercise of the power as exercised conflicts with the Constitution and laws of the United States, or with any other provision of the constitution of this state. And,

Third.—Whether the exercise of the power in the particular case and manner is contrary to natural justice. For, as it is to be conclusively presumed that the people, while possessing the power,

would not have exercised it contrary to that fundamental principle of the social compact, it is in like manner to be presumed that they did not intend to delegate and have not delegated the power so to exercise it to the legislature. An unjust use of the power is therefore an abuse of it and void.

We come then to the application of these inquiries to the case in hand. And first,—What is the power which has been exercised, and is it delegated in the Constitution?

The power exercised is the right of eminent domain, which is a part of the legislative power, and is unquestionably delegated in the 1st clause of the 3d article of the Constitution. This right is a paramount right attached to every man's land, and he holds it subject to its exercise. Bouvier defines it to be the right which the people or government retain over the estates of individuals to resume the same for public use; and that definition is sufficiently comprehensive and in accordance with the authorities.

2. The law in question does not conflict with the Constitution or laws of the United States, or any provision of the constitution of this state. There is a clause in the bill of rights requiring just compensation to be made when the power is exercised, and as a condition of its exercise. Much misconception has prevailed in relation to the nature of that clause, but it is simply a condition attached to the exercise of the right of eminent domain. It does not purport to be a grant of power, but recognises its existence. Its import is precisely what it would be if the language used had been, "the right of eminent domain shall not be exercised unless just compensation be made for the property taken." The convention which framed the Constitution of 1818 was composed of very able men, many of them distinguished jurists. They framed a constitution remarkably concise, clear, and unambiguous. Whatever they intended to say they said, and in simple language, so that it could be understood by the people. They knew, when they provided that the whole legislative power should vest in the legislature, that the right of eminent domain would vest as a part of it, and they did not except it. They therefore intended it should vest. So when they framed the condition to be attached to its exercise, they did not use the words "eminent domain," for those words would not have been intelligible to the people, but they did use the precise language employed by jurists to define and describe that right. It is evident therefore that they intended to attach

the condition to the *exercise* of that right merely, and there is not in that clause, or anywhere else in the constitution, ground for suspicion even, that they intended to define or limit in any way or manner the right itself. The law in question complies with the condition and is not in conflict.

3. The principal objections to the law are founded on the assumption that it is contrary to natural justice. I am satisfied that it is not. The right to take private property for public use, or of eminent domain, is a *reserved* right attached to every man's land, and paramount to his right of ownership. He holds his land subject to that right, and cannot complain of injustice when it is lawfully exercised. The right consists of two elements,—the right to take, and the right to judge of and determine the exigency and the necessity for taking it. These are both and equally vested in the legislature. Bouvier (Law Dictionary) says, "It belongs to the legislature to decide what improvements are of sufficient importance to justify the exercise of the right of eminent domain." And the authorities cited fully sustain him. It is for the legislature, therefore, to determine what is required by the wants of the people, or for the public good, in the exercise of a sound discretion. With the *bonâ fide* and not unreasonable exercise of that discretion courts cannot interfere. As the legislature in this case have exercised their discretion honestly, deliberately, and after much agitation of the subject, and the law is confessedly beneficial to the public interest, there would seem to be no question about its constitutionality.

But several objections are made on the ground that the right is limited to actual governmental or individual *use*, and they must be fairly examined.

The objections are made in various forms, but they may all be resolved, substantially, into two classes. The first class of objectors ignore entirely the fact that the right of eminent domain is granted in the constitution as part of the legislative power, and assume the grant to be by the clause in the bill of rights; and further assume that every man is the absolute owner of his property, and that the grant is an invasion of that ownership; and then argue that the grant is in derogation of common right, and to be strictly construed; and therefore that the terms "public use" should be construed to be a use by the government, its officers and agents only. As this objection is founded on an ignorance of

the existence of the right of eminent domain in the legislature independent of the clause in question, a false assumption in relation to the character of that clause, and a false assumption as to the absolute ownership of the property, and is wholly unsupported by authority, it is entitled to no consideration.

The second class of objectors concede the right of eminent domain in the legislature, but claim that the clause in the bill of rights is an implied prohibition against taking the property for any other purpose, and that the words "public use" must be construed to mean an *actual personal use* by the government or by individual members of the public. I do not think the claim that the clause in the bill of rights contains an implied prohibition is correct, or see its materiality if it is. It is the essence of the right of eminent domain that the property shall be taken "for public use," and the question remains open, what is the meaning of the words, and who is to determine what constitutes such use, whether there be such a prohibition or not.

But suppose it admitted that some actual use by the public is essential to the just exercise of the right of eminent domain, the law will still be constitutional.

This class of objectors concede that grants of rights of easement to railroad companies, water companies for the distribution of water in cities and villages, and gas light companies, are constitutional, because they say the public use them. But let us see what use the public make of them. A. takes his goods to the railroad, pays the freight to their place of destination, places them in the cars, or they are placed there by the employees of the company, and they are transported pursuant to his contract. Now to have the use of a thing in the sense in which the objectors use the words, is to have some exclusive occupation and control of it. What use or control has A. of the road, its equipments or operation, by reason of the fact that he has shipped his goods upon it? None whatever. If he can be said to use anything it is the *transportation*, the *result* or *product* of the use and operation of the road and its equipments by the company. Nor is the case different if he applies for transportation for himself, except in the deceptive particular that, being animate and having the power of locomotion, he is expected to place himself upon the train instead of being placed there by the employees of the company. In all other respects he is as much the *passive recipient of*

transportation, as the result or product of the operation of the road, as his inanimate goods. So too of the water power company. The public have no use of the franchise or structure, nor control of its operations. All they have is the use of the water delivered to them by the operation of the structures as used and controlled by the company. The same is true of the gas light company.

The following proposition then may be deduced from the three instances alluded to and conceded to be constitutional, viz.:

The legislature may lawfully grant rights of easement to individuals or corporations to enable them to erect and operate structures, if the result of their operation is the production of an article or thing intended to be furnished or sold to the public for a beneficial use, and to supply their reasonable wants.

This proposition covers the case in hand as perfectly as it does either of the other three, for the flowage law is intended to grant rights of easement which will enable individuals or corporations to enlarge or erect and operate structures, the result or product of the operation of which will be articles (such as cotton or woollen cloth and the like) intended to be sold to the public for their necessary and beneficial use. And if there be any element of public use in the other cases or either of them, it is contained in the law in question, and it is constitutional upon the principles claimed or conceded by this class of objectors.

But there is no *such* limitation, nor *any* specific limitation to the *bonâ fide* exercise of their discretion by the legislature, known to the law. The cases cited from Kent are not cases of limitation, but of arbitrary power, exercised pretendedly and fraudulently, under cover of the right. If the true nature of the right of eminent domain, and the true object and operation of the clause in the bill of rights are regarded, all difficulties vanish; and I have yet to hear or read the first argument or opinion adverse to the law in question, having any plausibility, which was not founded on a misconception of one or the other. A distinguished judge, even, speaks of the taking and grant "as a forced sale;" but if such were their character they could not stand an instant. The legislature cannot compel one man to sell to another. The true theory and principle of the matter is, that the legislature *resume* dominion over the property, and having resumed it, instead of using it by their agents, to effect the intended public good, and to

avoid entanglement in the common business of life, they revest it in other individuals or corporations, to be used by them, in such manner as to effect directly or indirectly, or incidentally as the case may be, the public good intended. And it is perfectly immaterial to the owner of the property in what manner the legislature use it or cause it to be used after they have resumed it and he is justly and fully compensated. He has on that acoount no ground for complaint. Upon the strictest principles, therefore, I consider the law constitutional.

Upon the other points I also concur with the majority of the court.

CARPENTER, J., concurred in both the foregoing opinions. HINMAN, C. J., dissented.

The importance and acknowledged difficulty of the question so extensively discussed in the opinion of Mr. Justice BUTLER in the foregoing case, would certainly justify an extended examination of its grounds. But we should not desire to do this, as a general thing, unless we felt some confidence we might aid in bringing the public opinion, or the judicial opinion of the public, to a different result at some future time. This is always hopeful, where the course of judicial decision is both wrong in principle and inconvenient in its practical operation. In such a case the inconvenience of the rule constantly prompts to revision and agitation until the obstinacy of judicial blindness is compelled to see, and to retrace its error. But where the error, in principle, is of so long standing as in the present case, and fortified by such repeated acts of legislative confirmation, and above all, where it is further supported by all public opinion, and the convenience of multitudes, against the remonstrances of here and there a churlish landowner, there is small hope that the speculative error of the law will ever be made so obvious as to induce the majority of judicial tribunals in the states where these "Mill Laws" exist to retrace their steps, and declare them, or the decisions in regard to them, based on wrong grounds. There are two systems of "Mill Laws," one called the Massachusetts, and the other the Virginia system, with reference to the states where they had their origin. In the former the statute only gives the right to flow the land of another against his will, for the purpose of extending a mill-pond or water-power. There is here no attempt to take the land for, or to transfer any interest in the land to, the owner of the mill. And although the statutes, in some of the states, following this class of laws, may declare the right to flow the land for mill purposes, and to continue the dam after the recovery of damages for its continuance hitherto, yet this may be regarded as nothing more than the form of affirming that the party whose land is thus flowed shall have no redress, by way of injunction out of chancery, against continuing the dam, and no right to appeal to a common-law court to remove the nuisance, *prosternere nocumentum*, and no right to abate the nuisance by his own act; in short, that he shall have no remedy except to have his damages annually assessed by a jury. Treating the

statutes of this class as a mere prescription of the exclusive remedy for an acknowledged wrong, we see no very clear ground to complain of their constitutionality. But where it is attempted to be placed upon the ground of right, as coming fairly within the range of exercising the prerogative power of eminent domain, it has always seemed to us exceedingly questionable.

And we understand Chief Justice SHAW to have always placed the constitutionality of these statutes on other grounds than that of the exercise of the right of eminent domain by the sovereign power of the state: *Murdock* v. *Stickney*, 8 Cush. 113. But in *Talbott* v. *Hudson*, 24 Law Reporter 228, BIGELOW, C. J., seems to regard these laws as a mere assertion of the right of eminent domain. And the last case, as well as that of *Hazen* v. *The Essex Co.*, 12 Cush. 475, where the statute authorized one water-power to be so extended as to ruin another, there seems no very obvious mode of defending the proceeding, unless it can be done upon the plea that it is a legitimate exercise of the right of eminent domain. No other mode occurs to us at present, unless we can say that it is only the provision of a peculiar remedy in a special class of cases. And we might be satisfied with this view if the statute, in terms, or by fair construction, could be made to apply to classes of cases, as where one destroys property of another to escape greater loss himself. But it seems to be provided only for the particular cases, and not to come within the class of statutes affecting procedure, which always apply to classes of cases. It looks, therefore, in these cases, very much like the exercise of sovereign power under the claim of the reserved right to apply land, or the use of it, to public use. And in *Jordan* v. *Woodward*, 40 Me. 317, RICE, J., seems to treat the proceedings as the exercise of the right of eminent domain, and declares that these "Mill Acts" are the taking of the use of one man's land for the benefit or use of another, and that this is going to the very extreme verge of constitutional right, and, if new, would be held unconstitutional. And the principal case, as well as that of *Olmstead* v. *Camp*, 33 Conn. 532, upon which the decision rests, are placed upon the ground of the lawful exercise of the right of eminent domain. And we understand the Supreme Court of New Hamshire have recently determined the same question, in a very elaborate opinion, which is not reported, but in which the court vindicate the constitutionality of these laws, and, as we infer, upon the ground of the right of eminent domain.

This is such an array of authority that we should have little hope of it ever being changed, and especially when these laws are so popular, and those who doubt their validity so little regarded. It seems to be a case where might makes right, by common consent, and the judiciary have no function remaining but to assign the best reason they can for a foregone conclusion. The case of *Moore* v. *Wright*, 34 Alabama 311, is the only case where these laws have been held unconstitutional, as far as we know. And this case was under a statute like those of Virginia. But we are not sure the cases differ essentially in principle, if both are attempted to be placed upon the ground of the exercise of the right of eminent domain. For in that view it cannot affect the principle very essentially whether you take the land or the use of it. And, indeed, there is no essential difference between taking a perpetual use of land and the land itself. The injury is much the same in either case.

But it seems to us there is an essential difference in the two classes of cases in one particular. In none of the Massachusetts cases is there any attempt to

transfer any estate in the land or in the use of it, from the owner, and to vest it in the millowner. In some cases the use is taken by the millowner and in others the mill is destroyed; but in neither case is any estate transferred. And if in both of these classes of cases the statute had simply provided that the injured party should only recover in a particular mode and to a certain extent, there could be no question of the validity of the statute. And it seems to us, from the reasoning of the judges in all the earlier Massachusetts cases, that there was no expectation of defending the constitutional validity of the statutes upon any such broad ground as that of eminent domain. PARKER, C. J., in *Sewall v. Flagg*, 11 Mass. 364, said the act seemed to be incautiously drawn upon the plan of, or in too close conformity with, the Colonial Acts.

But the statutes following the lead of those in Virginia must stand, if at all, upon the right of eminent domain, and this may have led to placing them all, of both classes, upon that ground. But it seems to us almost equivalent to saying, that the legislature may always take private property for the public good, and that is equivalent to saying they may always take it for what they regard the public good. For the public good is so indefinite a term, that courts will consider that the legislature must be as capable of deciding that question as any other tribunal. It being a question of fact, mainly, it is scarcely subject to revision by the courts. If there is any evidence of its being for the public good the act must stand—and a case will seldom occur that a statute would pass the legislature, on any ground, against all the evidence of its character and quality.

It seems to us, therefore, that there is no security in giving this right of eminent domain so wide an extension. It becomes practically the same as saying the legislature may take private property when they choose, and apply it to such uses as they deem public uses. If it were limited to purposes of intercommunication, or education, or health, or public defences, or those well-known and clearly defined public uses for which all codes of law provide, there could be no uncertainty, and no cause for the exercise of arbitrary power, but where it is extended to mills of every class and character, most of which are mere pecuniary ventures, no more connected with public use than any other commercial enterprise, it may as well include public inns, or public stables, or hospitals, or asylums, or, indeed, almost any public comfort or convenience. We can only say that it seems to us exceedingly to be regretted that the doctrine of Chief Justice SHAW had not been more heeded and more strictly followed, but there is, perhaps, little hope it will ever be again possible to bring back the public mind to any such salutary rule. And we fear there is a growing laxity in regard to judicial constructions, based upon supposed public demand and modern advancement, which has no foundation in fact, and which will ultimately be sure to unsettle all the old foundations. We desire to disclaim all morbid dread of reasonable conformity to advancing developments. But the thing is a convenient cover for all error.

I. F. R.